BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL HOLZ		
Claimant	)	
VS.	)	
	)	Docket Nos. 1,060,102
KAISER FLOOR CONTRACTING	)	& 1,061,303[1]
Respondent	)	
AND	)	
	)	
FARMERS INSURANCE EXCHANGE	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the August 6, 2012, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. John F. Carpinelli of Topeka, Kansas, appeared for claimant. Lyndsay E. Spiking of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 31, 2012, preliminary hearing and exhibits thereto; the Stipulation and May 11, 2012, discovery deposition of claimant filed by the parties on August 2, 2012; and all pleadings contained in the administrative file.

ISSUES

Claimant filed two claims. In Docket No. 1,061,303, claimant is alleging a repetitive injury that occurred during a period of time from September 2006 to March 3, 2011. At that time, the 2011 amendments to the Kansas Workers Compensation Act were not yet in effect (Old Law). The statutes governing repetitive injuries and notice were amended by the Kansas Legislature and the changes took effect on May 15, 2011 (New Law). In

[1] Although respondent's Application for Review lists only Docket No. 1,060,102, the ALJ's Preliminary Hearing Order covered the two docketed claims and the Board considers both claims appealed. See *McMurtry v. OK Transfer & Storage, Inc.*, Nos. 1,025,690 & 1,042,145, 2011 WL 4961950 (Kan. WCAB Sept. 13, 2011).

Docket No. 1,060,102, claimant is asserting a repetitive injury that occurred during the period beginning January 9, 2012, and continuing. Therefore, Docket No. 1,060,102 is governed by the New Law.

ALJ Sanders issued a Preliminary Hearing Order in both claims granting claimant's request for medical treatment and appointing Dr. Lynn Ketchum as claimant's authorized treating physician. ALJ Sanders did not specify a date of accident or a date claimant sustained an injury by repetitive trauma. Nor did she state in which claim she was authorizing medical treatment with Dr. Ketchum. However, ALJ Sanders stated Dr. Prostic opined claimant's repetitive work was the prevailing factor for his bilateral carpal tunnel syndrome. That implies ALJ Sanders was authorizing medical treatment in Docket No. 1,060,102.

Respondent filed an Application for Review only in Docket No. 1,060,102. Respondent denied claimant's injuries arose out of and in the course of his employment. Respondent also asserted that the ALJ exceeded her authority by appointing Dr. Ketchum as claimant's authorized treating physician. The Board will treat respondent's Application for Review as an appeal of both claims.

The issues before the Board are:

1. In Docket No. 1,061,303, did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent?

2. In Docket No. 1,060,102, did claimant sustain an injury by repetitive trauma arising out of and in the course of his employment with respondent? Specifically, were claimant's job activities the prevailing factor causing his current need for medical treatment?

3. If the Board finds that claimant sustained a personal injury by accident in Docket No. 1,061,303 or an injury by repetitive trauma in Docket No. 1,060,102 arising out of and in the course of his employment with respondent, did the ALJ exceed her jurisdiction by appointing Dr. Ketchum as claimant's authorized treating physician?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

On March 22, 2012, claimant filed an Application for Hearing alleging "repetitive trauma January 9, 2012 through current and continuing with each and every working day."[2]

[2] Application for Hearing in Docket No. 1,060,102 (filed Mar. 22, 2012).

The Application for Hearing also stated claimant was advised by a physician on March 14, 2012, that the condition was work related. The injuries alleged were to the bilateral upper extremities, including arms, hands, wrists and fingers. That claim was assigned Docket No. 1,060,102. In Docket No. 1,061,303, claimant filed an Application for Hearing on June 20, 2012, asserting injuries to the bilateral upper extremities and neck as the result of repetitive work as a tile setter from September 2006 to March 3, 2011. On July 31, 2012, a preliminary hearing was held in both claims on claimant's request for medical treatment.

Claimant began working for respondent in September 2006 and continued doing so until March 3, 2011, when he could no longer work as the result of a right shoulder injury. Claimant remained off work until a week after being released to work on January 9, 2012. After returning to work with respondent, claimant performed the same job duties as he did prior to March 3, 2011. That right shoulder injury resulted in claimant filing a workers compensation claim in Docket No. 1,055,246 and it is a separate injury than those alleged by claimant in Docket Nos. 1,060,102 and 1,061,303.

Claimant testified that during the week before March 21, 2012, he quit working for respondent due to lack of work. He now is self employed as a tile setter and works 10 to 15 hours a week. Claimant can work at his own pace and his sons assist him.

While working for respondent, claimant performed a variety of duties that required the use of his hands. He would install showers, caulk, mix mortar, grout and cut tiles. His job also required a great deal of lifting, including lifting bags of grout, boxes of tiles, buckets of glue and shower panels. Claimant's job required him to use several power tools, including a sander, drill, saw and grinder. When claimant performed his job duties he would switch hands when the hand he was using became tired.

Claimant confirmed that on July 11, 2011, when he testified in Docket No. 1,055,246, he had no complaints of carpal tunnel syndrome. He also indicated that when he was off work for his shoulder injury, he had no symptoms of numbness, pain or burning in his hands. Chiropractic records indicated claimant complained of hand numbness on November 17, 2003; July 3, 2007; September 2007; October 11, 2008; and August 17, 2009. He did not see a chiropractor for the hand numbness after August 17, 2009. Claimant testified at that time he merely had tingling in his fingers, but now has constant burning. On cross-examination, claimant testified the numbness and tingling in his hands that he complained to the chiropractor about occurred in conjunction with lower back pain he was having.

Claimant testified he saw Dr. Elizabeth Hatcher on August 29, 2011, but did not complain to her of numnbess, tingling or pain involving his hands or wrists, because he had no such complaints. He saw Dr. Michael J. Malin on June 25 and September 13, 2010, and January 28, March 3, March 11, August 30, and December 5, 2011, but did not make complaints about his hands or wrists during those visits. Dr. Ken Teter, an orthopedic doctor, examined claimant on April 5, 2011, as did Dr. Donald T. Mead on March 25, 2011.

The records of Drs. Teter and Mead do not reflect claimant complained of hand or wrist symptoms. Claimant, however, did not seek treatment from any of the foregoing physicians for his hands or wrists. Most of the visits were regarding claimant's right shoulder injury, or other ailments.

At the request of his counsel, claimant's right shoulder was evaluated on March 14, 2012, by Dr. Edward J. Prostic, an orthopedic specialist. Dr. Prostic noted in his evaluation report that, "In addition, he is developing bilateral carpal tunnel syndrome. He needs to have an EMG of his upper extremities to guide further treatment."[3] Claimant testified he first learned of having carpal tunnel syndrome during that visit with Dr. Prostic. Prior to then, claimant never missed work or received treatment because of his hand symptoms.

Without seeing claimant again, Dr. Prostic sent claimant's attorney letters dated July 9 and 20, 2012. In the first letter, he indicated the repetitious forceful use of claimant's hands while employed by respondent was the prevailing factor of carpal tunnel syndrome and that he should open a claim for repetitive minor trauma through March 14, 2012. The July 20th letter indicated that after reviewing claimant's chiropractic records, Dr. Prostic's July 9th opinions had not changed.

At the request of respondent, Dr. Brian J. Divelbiss saw claimant on May 23, 2012. His note from that visit indicated claimant had intermittent tingling and numbness two years earlier, but that three months ago he began developing nighttime numbness and tingling, which was affecting his sleep. The note indicated that claimant was working at a job site where for four days he handled a lot of panels weighing 50 to 60 pounds. Claimant testified he worked on Fort Riley installing large shower panels, weighing 40 to 50 pounds, which he had to carry long distances. He would cut the panels, sometimes several times, sand them and caulk them. Claimant testified that his hand and wrist symptoms were not only the result of the four-day job installing shower panels, but he attributed his hand and wrist symptoms to the other tasks he performed with his hands while working for respondent.

Claimant was diagnosed by Dr. Divelbiss with bilateral carpal tunnel syndrome. He opined claimant's job activities between January and March 2012 certainly may have aggravated or accelerated a pre-existing carpal tunnel syndrome. However, he did not believe those job activities would be the prevailing factor.

When asked by ALJ Sanders when he began noticing symptoms in his hands that he did not attribute to his back, claimant replied, "It was whatever date that was after the Fort Riley job, and to be honest with you, they, you know, I never paid much attention to

[3] P.H. Trans., Cl. Ex. 2.

them [symptoms in his hands] because I felt like they were going to go away. I thought I'd just overworked."[4]

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,061,303:

Under the Old Law, the Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

Claimant testified that his carpal tunnel symptoms began after he returned to work in January 2012. He did see a chiropractor several times for tingling and numbness in his hands. However, the last of those visits occurred in August 2009, and claimant testified the tingling and numbness in his hands were associated with a back problem. There are no medical records indicating claimant complained of hand symptoms until he saw Dr. Prostic on March 14, 2012. Simply put, in Docket No. 1,061,303, claimant failed to prove by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

Docket No. 1,060,102:

Under the New Law, the Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[8]

The following provisions of K.S.A. 2011 Supp. 44-508 are applicable:

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[4] *Id.*, at 50-51.

[5] K.S.A. 2010 Supp. 44-501(a).

[6] K.S.A. 2010 Supp. 44-508(g).

[7] K.S.A. 2011 Supp. 44-501b(c).

[8] K.S.A. 2011 Supp. 44-508(h).

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> . . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
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> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

The two medical experts who examined claimant have divergent opinions on the issue of prevailing factor. Dr. Prostic specifically stated claimant's job activities were the prevailing factor causing his carpal tunnel syndrome and requirement for additional treatment. On the other hand, Dr. Divelbiss stated claimant's job activities were not the prevailing factor, and stated claimant had carpal tunnel syndrome symptoms for several years prior to the recent worsening of his symptoms. However, claimant's undisputed testimony is that his hand symptoms surfaced between January 9, 2012, and when he quit working for respondent in March 2012. No evidence was offered by respondent indicating

that an activity other than work tasks performed for respondent caused claimant to develop carpal tunnel syndrome. This Board Member finds that claimant's work activities were the prevailing factor causing his current need for medical treatment. Accordingly, claimant sustained an injury by repetitive trauma arising out of and in the course of his employment with respondent.

Respondent also argues the ALJ exceeded her authority by appointing Dr. Lynn Ketchum as authorized treating physician. It argues that it did not refuse claimant medical treatment, but authorized Dr. Divelbiss to treat claimant. Therefore, the appropriate remedy for claimant was to request a change of physicians pursuant to K.S.A. 2011 Supp. 44-510h. This is an appeal from a preliminary hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2011 Supp. 44-551(i)(2)(A). In addition K.S.A. 2011 Supp. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in ordering medical benefits is not an argument the Board has jurisdiction to consider.[9] K.S.A. 2011 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation. This Board Member finds the Board has no jurisdiction to review this issue.

If the Board did have jurisdiction to consider this issue, this Board Member would find the ALJ did not err in authorizing Dr. Ketchum as claimant's treating physician. From Dr. Divelbiss' report, it appears the reason he evaluated claimant was to render an opinion that claimant's work activities were not the prevailing factor causing claimant's injuries or current need for medical treatment. There is nothing in the record to indicate that respondent agreed to authorize Dr. Divelbiss to treat claimant.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

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[9] *Beck v. U.S.D. 475*, No. 1,039,614, 2010 WL 2242752 (Kan. WCAB May 25, 2010); *Coates v. State of Kansas*, No. 1,057,719, 2012 WL 1652971 (Kan. WCAB Apr. 12, 2012).

[10] K.S.A. 2011 Supp. 44-534a.

[11] K.S.A. 2011 Supp. 44-555c(k).

CONCLUSION

1. In Docket No. 1,061,303, claimant failed to prove by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

2. In Docket No. 1,060,102, claimant sustained an injury by repetitive trauma arising out of and in the course of his employment with respondent. Specifically, claimant's job activities were the prevailing factor causing his injury and current need for medical treatment.

3. The ALJ did not exceed her jurisdiction by appointing Dr. Ketchum as claimant's authorized treating physician and, therefore, the Board does not have jurisdiction to review that issue.

WHEREFORE, the undersigned Board Member modifies the August 6, 2012, Preliminary Hearing Order entered by ALJ Sanders by finding claimant did not sustain a personal injury by accident in Docket No. 1,061,303 arising out of and in the course of his employment, but finds that in Docket No. 1,060,102, claimant sustained an injury by repetitive trauma arising out of and in the course of his employment with respondent. Respondent's appeal on the issue of whether ALJ Sanders erred by authorizing Dr. Ketchum as claimant's treating physician is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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